FILE COPY

Office-Supreme Court, U.S.
FILED
NOV 2 1959
JAMES R. BROWNING, Clerk

# Supreme Court Of The United States

OCTOBER TERM, 1959

Case No. 508

JAMES E. COLLINS, JR.
PETITIONER,

*vs.*

HERNDON E. RISNER, d b a
CAPITAL TRUCKING COMPANY
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

THOMAS E. McCUTCHEN, JR.,
THOMAS B. WHALEY,
HOOVER C. BLANTON,
813 Barringer Building
Columbia, South Carolina
SOL BLATT, JR.,
Barnwell, South Carolina
Attorneys for Petitioner.

# INDEX


| | PAGE |
|---|---|
| Citation to Opinion below | 1 |
| Jurisdictional Statement | 2 |
| Questions Presented | 2 |
| Statutes Involved | 3 |
| Statement of the Case | 4 |
| Reasons for Allowance of the Writ | 8 |
| 1. Whether petitioner was guilty of contributory negligence or recklessness was a determination to be made only by the jury and the jury having rendered its verdict in favor of petitioner is not guilty of contributory negligence or recklessness which bars his recovery as a matter of law | 8 |
| 2. The jury found respondent guilty of causative violation of Sections 46-361, 46-363, 46-381, and 46-393 of the South Carolina Code of Laws which constitutes evidence of recklessness and gross negligence as a matter of law and the further findings of general negligence on the part of respondent in failing to keep his motor vehicle under proper control, in failing to keep a proper lookout and in falling asleep while driving was ample evidence from which the jury could have found respondent guilty of gross negligence and recklessness | 14 |
| 3. Whether the "main traveled part of the highway" at the point of collision included the improved shoulders was a question of fact to be determined by the jury and not a question of law for the court | 16 |
| Conclusion | 17 |
| Appendix—Opinion of the Court of Appeals for the Fourth Circuit | 20 |

## TABLE OF AUTHORITIES

### Cases


| | PAGE |
|---|---|
| Ayers v. Atlantic Greyhound Corporation, 208 S. C. 267, 37 S. E. 2d 737 | 10 |
| Beacon Theatres, Inc. v. Westover, 359 U. S. 500, 79 S. Ct. 948, 3 L. Ed. 2d 988 | 18 |
| Bruin v. Tribble, (C.A. - 4; S.C.) 238 F. 2d 12 | 15 |
| Burcham v. J. P. Stevens & Co., (C.A. - 4) 209 F. 2d 35 | 11 |
| Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U. S. 525, 78 S. Ct. 893, 2 L. Ed. 2d 953 | 17 |
| Collins v. Risner, (C.A. 4 - S. C.) 269 F. 2d 654 | I, 8, 9 |
| Dick v. New York Life Insurance Co., 359 U. S. 437, 79 S. Ct. 921, 3 L. Ed. 2d 935 | 14 |
| Dimick v. Schiedt, 293 U.S. 474, 55 S. Ct. 296, 79 L. Ed. 603 | 18 |
| Field v. Gregory, 280 S.C. 39, 94 S.E. 2d 15 | 15 |
| Gillespie v. Ford, 225 S.C. 104, 81 S.E. 2d 44 | 11 |
| Glenn v. Southern Ry. Co., 145 S.C. 41, 142 S.E. 801 | 16 |
| Greene v. Miller, et al, (D.C. S.C.), 114 F. Supp. 150 | 10 |
| Gunning v. Cooley, 281 U.S. 90, 50 S. Ct. 231, 74 L. Ed. 720 | 2 |
| Harper v. Harper, 235 N.C. 260, 34 S.E. 2d 185 | 15 |
| Hitchcock v. Tosta, 153 Cal. App. 2d 432, 314 P. 2d 513 | 17 |
| Howey v. Jordan's, Inc., 223 S.C. 71, 74 S.E. 2d 216 | 10 |
| Jacks v. Townsend, 228 S.C. 26, 88 S.E. 2d 776 | 10 |
| Jackson v. Edmondson, (Tex. Civ. App.) 129 S.W. 2d 369 | 17 |
| Jacob v. City of New York, 315 U.S. 752, 62 S. Ct. 854, 86 L. Ed. 1166 | 18 |
| Jeffers v. Hardeman, 231 S.C. 578, 99 S.E. 2d 402 | 10 |
| Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 79 S. Ct. 406, 3 L. Ed. 2d 550 | 14 |
| Ketchum v. Pattee, 37 Cal. App. 2d 122, 98 P. 2d 1051 | 17 |
| Ligon v. Hommell, (Tex. Civ. App.), 189 S.W. 2d 23 | 17 |

PAGE

Locklear v. Southeastern Stages, Inc., 193 S.C. 309, 8 S.E. 2d 321 10
Magenau v. Aetna Freight Lines, Inc., 360 U.S. 273, 79 S. Ct. 1184, 3 L. Ed. 2d 1224 18
Morrow v. Evans, 223 S.C. 288, 75 S.E. 2d 598 15
Phillips v. Davis, 225 S.C. 395, 82 S.E. 2d 515 10
Thompson v. Brewer, 225 S.C. 460, 82 S.E. 2d 685 10
Tinsley v. Western Union Telegraph Co., 72 S.C. 350, 51 S.E. 913 16
Vernon v. Atlantic Coast Line Railroad Company, 221 S.C. 376, 70 S.E. 2d 862 15

**Statutes**

S. C. Code of Laws, 1952, Section 46-361 3, 14, 15
S. C. Code of Laws, 1952, Section 46-363 3, 14, 15
S. C. Code of Laws, 1952, Section 46-381 3, 14, 15
S. C. Code of Laws, 1952, Section 46-393 3, 4, 14, 15
S. C. Code of Laws, 1952, Section 46-481 3, 4, 8, 9, 16
28 U. S. C. Section 1254 (1) 2

# Supreme Court Of The United States

OCTOBER TERM, 1959

---

Case No._____.

JAMES E. COLLINS, JR.
PETITIONER,

*versus*

HERNDON E. RISNER, d/b/a
CAPITAL TRUCKING COMPANY
RESPONDENT.

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

---

Petitioner prays that a writ of certiorari issue to review a decision of the United States Court of Appeals for the Fourth Circuit, affirming a judgment *non obstante veredicto* of the United States District Court for the Eastern District of South Carolina in favor of respondent, entered upon a verdict directed by the Court.

## CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, printed in the Appendix hereto, is reported in 269 Federal Reporter, Second Series at page 654.

## JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on August 6, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1).

## QUESTIONS PRESENTED

The questions presented arise from the District Judge's setting aside of a jury's verdict in favor of the plaintiff (Petitioner) and granting judgment *non obstante verdicto* for the defendant (respondent), under the evidence presented and the applicable law. Because a verdict can be directed only where there is no substantial evidence to support recovery by the party against whom it is directed or where the evidence is all against him or so overwhelmingly so as to leave no room to doubt what the fact is (*Gunning v. Cooley*, 281 U.S. 90, 50 S.Ct. 231, 74 L.Ed. 720), the questions presented are directed to the evidence but they encompass the failure of both the trial Court and the Court of Appeals to apply the Federal law applicable to the fact finding function of a jury in jury trials, in violation of the decisions of this Court and in violation of the petitioner's rights under the Seventh Amendment to the Constitution of the United States, and their further failure to apply the South Carolina law of negligence, contributory negligence, and recklessness in tort actions arising in South Carolina.

The Questions presented are:

I. Was petitioner guilty of contributory negligence and recklessness as a matter of law which bars his recovery?

II. Was there no evidence of recklessness or gross negligence on the part of respondent as a matter of law?

III. Did the "main traveled part of the highway" at the point of the collision include the improved shoulders?

## STATUTES INVOLVED

The South Carolina statutes involved are Sections 46-361; 46-363; 46-381; 46-393; and 46-481 of the 1952 Code of Laws of South Carolina, found in Volume 4, pages 969 (Sections 46-361 and 46-363), 971 (Section 46-381), 974 (Section 46-393), and 984 (Section 46-481) of said Code.

*Section* 46-361 *General Rule*

No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. In every event speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering the highway in compliance with legal requirements and the duty of all persons to use due care.

*Section* 46-363. *When lower speeds required.*

The driver of every vehicle shall, consistent with the requirements of Section 46-361, drive at an appropriate reduced speed when approaching and crossing an intersection or railroad grade crossing, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway and when any special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions.

*Section* 46-381. *Drivers to drive on right side; exceptions.*

Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway except as follows:

(1) When overtaking and passing another vehicle proceeding in the same direction under the rules governing such movement;

(2) When the right half of a roadway is closed to traffic while under construction or repair;

(3) Upon a roadway divided into three marked lanes for traffic under the rules applicable thereon; or

(4) Upon a roadway designated and signposted for one-way traffic.

*Section* 46-393. *Following too closely.*

The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway.

*Section* 46-481. *Outside of business or residence districts.*

Upon a highway outside of a business or residence district no person shall stop, park or leave standing any vehicle, whether attended or unattended, upon a paved or main traveled part of the highway when it is practicable to stop, park or so leave such vehicle off such part of such highway, but in every event an unobstructed width of the highway opposite a standing vehicle shall be left for the free passage of other vehicles and a clear view of such stopped vehicle shall be available from a distance of two hundred feet in each direction upon such highway.

This section shall not apply to the drvier of any vehicle which is disabled while on the paved or main-traveled portion of a highway in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving such disabled vehicle in such position.

## STATEMENT OF THE CASE

This action was brought in the United States District Court for the Eastern District of South Carolina, Orangeburg Division, by petitioner against respondent seeking damages for injuries allegedly caused by the negligence, gross negligence and recklessness of respondent. Jurisdiction was based upon a diversity of citizenship between the parties.

Petitioner, James E. Collins, Jr. was a bakery route salesman and truck driver. At about 5:30 A.M. on January 25, 1957 he drove his truck from the bakery ware-

house, located about one mile west of Denmark, South Carolina to commence his route. At about the same time two additional trucks left the bakery, driven by other route salesmen and all three trucks headed eastward on U. S. Highway 78, through Denmark, toward Bamberg, South Carolina. A few hundred yards east of Denmark petitioner's truck and one of the other bakery trucks (driven by Still) overtook and passed respondent's tractor and trailer unit, being driven by Joseph Earwood, which had slowed down for a railroad crossing. Earwood had left Atlanta, Georgia driving respondent's twenty-five ton tractor-trailer at approximately 11:00 P.M. on January 24th and had driven all night, a distance of some 230 miles.

The bakery truck driven by petitioner was seven or eight feet wide (appellant's appendix A-41) and respondent's tractor-trailer was eight feet wide (Appellant's appendix A-60). U. S. Highway 78 was an eighteen foot wide concrete strip with a four and one-half foot strip of asphalt improved shoulder on each side (Appellant's appendix A-49, A-61) and an additional dirt shoulder of at least eleven feet. Therefore, traffic traveling in each direction had nine feet of concrete plus four and one-half feet of asphalt improved shoulder. A state highway engineer testified that "when nobody is passing or anything, I would say the majority of traffic rides on the concrete" (Appellant's appendix A-64).

After passing the tractor-trailer the two bakery trucks proceeded along Highway 78 for about three or three and one-half miles at a speed of about forty-five to fifty miles per hour, being followed by the tractor-trailer (Appellant's appendix A-53). It was dark at the time and it is unquestioned that the lights on both bakery trucks, including the blinker and turn signals, were properly functioning prior to and after the collision (Appellant's appendix A-37, A-38, A-45). The lead bakery truck, driven by Still, followed by petitioner about one hundred yards behind, gave a turn signal and pulled off the highway and improved shoulder about six or seven feet (Appellant's appendix A-51) onto the dirt shoulder on the right (south)

side of the highway and petitioner, thinking that Still was in difficulty, after giving the required blinker and turn signals, pulled his truck alongside Still's truck about a foot or foot and one-half from it. (Appellant's appendix A-35, A-37, A-40, A-53, A-55). The left front and left rear wheels of petitioner's truck were about midway on the improved shoulder of the highway (Appellant's appendix A-41, A-42). This left the entire concrete strip and two feet or more of the improved shoulder for other eastbound traffic on the eastbound side of the highway. There was no other traffic at the time from either direction, only the two bakery trucks and respondent's tractor-trailer (Appellant's appendix A-37).

Both bakery truck drivers testified that the tractor-trailer was 1000 to 1500 feet behind the second bakery truck (Appellant's appendix A-37, A-55) when it pulled off the highway but the tractor driver Earwood testified he was only 100 feet behind petitioner's truck (Appellant's appendix A-60). Earwood also testified that he did not see brake lights come on nor did he see a turn signal on the Collins truck; in fact he did not even see the headlights of the Collins truck reflecting on the pavement ahead of him although (according to him) he was only 100 feet behind (Appellant's appendix A-60). Earwood readily admitted that he knew he could not stop his twenty-five ton tractor-trailer under a distance of 125 feet yet he *consciously* and *knowingly* kept (according to him) a distance of only 100 feet behind the preceding truck (Appellant's appendix A-60).

Petitioner's truck had been stopped alongside Still's truck twelve to fifteen seconds (Appellant's appendix A-36, A-53) when it was struck from the rear by respondent's tractor, hurled through the air *straight ahead* (Appellant's appendix A-48) about twenty feet and down along the dirt shoulder turning it over and around (Appellant's appendix A-36). The tractor went past "*partly on the shoulder*" (Appellant's appendix A-37). Earwood had an eighteen foot wide concrete highway in which to drive his eight foot wide tractor past petitioner's stopped truck. Although no other traffic was present, Earwood

had nine feet of concrete and an additional two or more feet of the improved asphalt shoulder for his (eastbound) lane of traffic in which to pass petitioner's truck, three feet more than the width of his tractor, yet he drove his twenty-five ton mobile unit into the rear of the Collins truck. There were no skid marks prior to the point of impact.

Earwood was pinned in the wreckage of his tractor and the driver Still went up to assist him and Earwood didn't even know "what happened" and admitted to Still that "I must have" been asleep (Appellant's appendix A-38, A-43.) Earwood also directed the wrecker personnel how to place the cables when they were extricating him from the wreck and he was also heard talking by the investigating highway patrolman (Appellant's appendix A-49). Petitioner sustained serious and permanent injuries in the collision.

The case was first tried before Honorable Ashton H. Williams, District Judge, and a jury on December 11, 12, and 13, 1957 and the jury being unable to agree upon a verdict a mistrial was ordered. At that trial the defendant (respondent) made a motion for a directed verdict and after the mistrial the motion was renewed and Judge Williams, in a lucid order (Appellant's appendix A-66 through A-73) well supported with authorities, denied the motion because under the evidence the jury could properly have concluded that the defendant "was guilty of such conduct as to amount to a willful, wanton and reckless disregard of the rights of the plaintiff" (Appellant's appendix A-68).

The case was again tried before Honorable C. C. Wyche, District Judge, and a jury on September 29 and 30, 1958. At that trial Judge Wyche ruled as a matter of law that the "main traveled part of the highway", as the phrase is used in Section 46-481 of the 1952 S. C. Code, included the four and one-half foot section of asphalt improved shoulder as well as the eighteen foot concrete section (Appellant's appendix A-66). Judge Wyche also directed a verdict in favor of the defendant (respondent) as to punitive damages and further held that there was no ev-

idence of gross negligence, recklessness or wilfulness by either driver (Appellant's appendix A-63). The case was submitted to the jury as to negligence and contributory negligence and the amount of damages, if any, and the jury returned a verdict in favor of the plaintiff (petitioner) for $15,000, upon which judgment was entered. The respondent moved for judgment *non obstante veredicto* and the motion was granted by Judge Wyche in his order dated November 26, 1958 (Appellant's appendix A-73), holding that the contributory negligence and recklessness of plaintiff (petitioner) barred his recovery, although the ground of contributory recklessness was not included in the grounds for judgment *non obstante veredicto* (Appellant's appendix A-75).

Petitioner appealed to the United States Court of Appeals for the Fourth Circuit which Court affirmed the District Court by its decision dated August 6, 1959 (Appendix, infra).

The Court of Appeals concurs that the jury's finding of negligence on the part of the driver Earwood "was fully justified by the evidence. The jury might well have found that Earwood was negligent in operating the trailer truck at a speed greater than was reasonable and prudent under the circumstances, failing to have his vehicle under proper control, or failing to keep a proper lookout" (Appendix 24, infra; 269 F. 2d 654, 657). However, the Court of Appeals concurred with the District Judge that petitioner was contributorily negligent as a matter of law by allegedly violating Section 46-481 of the 1952 S. C. Code.

## REASONS FOR ALLOWANCE OF THE WRIT

I. *Whether petitioner was guilty of contributory negligence or recklessness was a determination to be made only by the jury and the jury having rendered its verdict in favor of petitioner against respondent the petitioner is not guilty of contributory negligence or recklessness which bars his recovery as a matter of law.*

Because the District Judge ruled at the trial that there was no evidence of recklessness or wilfulness by

either driver the issue then was out of the case and the motion for judgment *non obstante veredicto* did not revive it because recklessness of petitioner was not included among the grounds of the motion. The trial judge then had no jurisdiction to grant a motion for judgment *non obstante veredicto* upon a ground that was not before him and upon which he had previously ruled to the contrary. The Court of Appeals gave no consideration to the question of petitioner's recklessness. However, it did say that the effect of the trial judge's setting aside the jury's verdict "constitutes a determination on his part that the plaintiff was guilty of contributory negligence as a matter of law" (269 F. 2d 657; Appendix 24, infra).

After giving lip service to the taproot principle that the evidence must be considered in the light most favorable to petitioner and any conflicts in the evidence resolved in his favor, since the jury had found in his favor, the Court of Appeals then proceeded to comb the record for bits of testimony favorable to respondent which it preferred to the evidence relied upon by petitioner, whose evidence the Court of Appeals characterized as "very weak" (269 F. 2d 659, appendix 27, infra) and "flimsy" (269 F. 2d 660; appendix 29, infra).

The contributory negligence assigned to petitioner is violation of Section 46-481 of the South Carolina Code of Laws, the pertinent part of which is:

> "Upon a highway outside of a business or residence district no person shall stop, park or leave standing any vehicle, whether attended or unattended, upon a paved or main traveled part of the highway when it is practicable to stop, park or so leave such vehicle off such part of such highway, but in every event an unobstructed width of the highway opposite a standing vehicle shall be left for the free passage of other vehicles and a clear view of such stopped vehicle shall be available from a distance of two hundred feet in each direction upon such highway."

Assuming that petitioner had stopped his truck on the "main traveled part of the highway" he certainly left more

than the necessary "unobstructed width" of the highway opposite him for the "free passage" of the tractor.

Diligent research discloses eight reported decisions in South Carolina construing and interpreting Section 46-481. They are: *Locklear* v. *Southeastern Stages, Inc.*, 193 S. C. 309, 8 S. E. 2d 321 (a case in which the defendant's bus stopped at night with the bus extending three feet into the edge of the main traveled part of the highway with the lights burning, when it was run into from the rear by an automobile; an injured passenger sued the defendant and the Court directed a verdict in favor of the defendant, holding that the negligence, if any, of the defendant in parking its bus in violation of the statute was not a proximate cause of the collision but that the negligence of the driver of the automobile "was the sole, proximate cause of the accident * * *. The fact that the bus was stopped on a portion of the paved highway was merely a circumstance of the accident, and not its proximate cause."); *Ayers* v. *Atlantic Greyhound Corporation*, 208 S. C. 267, 37 S. E. 2d 737 (where the question was properly submitted to the jury); *Greene* v. *Miller, et al*, 114 F. Supp. 150 (decision by Judge Wyche, holding that plaintiff's parking of his truck in violation of the statute did not contribute to the collision as a proximate cause thereof); *Howey* v. *Jordan's, Inc.*, 223 S. C. 71, 74 S. E. 2d 216 (holding that it is a jury question); *Phillips* v. *Davis*, 225 S. C. 395, 82 S. E. 2d 515 (plaintiff contributorily negligent as a matter of law in driving into a bus stopped partly on the highway where plaintiff had eighteen feet of pavement to the left of the bus in which to pass; therefore a determination of defendant's negligence not necessary. The Court pointed out that the test of whether the statute has been violated rests solely on the *practicability, not possibility*, of stopping elsewhere); *Thompson* v. *Brewer*, 225 S. C. 460, 82 S. E. 2d 685 (holding that a plaintiff who drove into the rear of a stopped truck was barred of recovery as a matter of law by reason of his own negligent and *reckless* conduct, whether defendant was negligent or not); *Jacks* vs. *Townsend*, 228 S. C. 26, 88 S. E. 2d 776 (jury question); *Jeffers* v. *Hardeman*, 231 S. C. 578, 99 S. E. 2d 402 (negligence

recklessness contributory negligence and recklessness and proximate cause are for the jury to determine.

All the foregoing cases hold that whether the statute has been violated and, of so, whether the violation contributed as a proximate cause to the collision, is for the jury to determine or else the driver of the following vehicle which runs into the stopped vehicle is found to be more at fault if not solely at fault as a matter of law.

"Contributory negligence is an affirmative defense and the defendant who pleads it has the burden of establishing it by the preponderance of the evidence. It rarely becomes a question of law for the Court." *Gillespie v. Ford*, 225 S. C. 104, 81 S. E. 2d 44, 47.

In the case of *Burcham* v. *J. P. Stevens & Co.* (C. A. 4) 209 F. 2d 35, the plaintiff in a motor vehicle collision case obtained a jury verdict which was set aside by the trial judge on a motion for judgment *non obstante veredicto* but on appeal the jury's verdict was reinstated. The opinion was written by that giant among jurists, Judge Parker, and his timeless dissertation is so appropriate to the present case that excerpts from that opinion follow:

> "It is well settled that on a motion for a directed verdict or on motion for judgment n.o.v. based on such motion, the evidence must be considered in the light most favorable to the party against whom the directed verdict or the judgment n.o.v. is asked, that any conflict in evidence must be resolved in his favor and that every conclusion or inference that can be legitimately drawn therefrom in his behalf must be drawn.
>
> * * *
>
> "The questions involved in the case are pure questions of fact—the rates of speed at which the respective motor vehicles were traveling, whether plaintiff exercised due care in looking for approaching cars before crossing the highway, whether defendants' driver was keeping a proper lookout and whether, in the exercise of ordinary care, he should have seen that plaintiff was in a dangerous situation from which he could not extricate himself in time to avoid the col-

lision. There was conflict in some of the testimony bearing upon the answers to these questions and conflicting inferences could be drawn even where the testimony was not in conflict. With respect to the speed of the respective vehicles, this was a matter as to which not only the credibility but also the judgment of the witnesses had to be considered. With respect to the care required of plaintiff in making the crossing, there were questions as to where plaintiff looked, what he saw and whether he should have looked oftener. With respect to the care exercised by the driver, there were questions as to when he could first have seen plaintiff turning if he had been keeping a proper lookout, what precautions he should have taken to avoid the collision when he saw that plaintiff was turning and whether or not he took such precautions. The case was clearly one in which jury trial was required by express provision of the Seventh Amendment to the Constitution.

"The courts are constantly urged in cases of this character to subsitute their judgment for that of the jury on questions of fact; and the seductive argument is made that a conclusion of fact which appears to the court to be reasonable is so clear that reasonable men could reach no other. If this sort of reasoning is allowed to prevail, however, it means that the courts are substituting their judgment for that of the jury on fact questions in violation of the constitutional requirement. Where there is a determinative fact in a case which is either admitted or established by evidence so conclusive that reasonable men could entertain no doubt with regard to it, the court should, of course, direct a verdict as a matter of law; but this does not mean that the court should direct a verdict on a weighing of the evidence or on a decision as to what inferences to be drawn therefrom are the more reasonable. Questions of negligence or contributory negligence are ordinarily questions of fact involving the application of the rule of the reasonably prudent man to the facts of the case, and they are not to be de-

cided by applying 'rules of thumb' to the evidentiary facts and treating as conclusions of law what are in reality conclusions of fact. As was well said by Mr. Justice Lamar in Grand Trunk Ry. Co. v. Ives, 144 U. S. 468, 417, 12 S. Ct. 679, 36 L. Ed. 485, quoted with approval by Chief Justice Fuller in Baltimore & O. R. Co. v. Griffith, 159 U. S. 603, 611, 16 S. Ct. 105, 40 L.Ed. 374, by Mr. Justice Harlan in Texas & Pac. R. Co. vs. Gentry, 163 U. S. 353, 364, 16 S. Ct. 1104, 41 L.Ed. 186, and by this court in Waid v. Chesapeake & O. R. Co., 4 Cir., 14 F.2d 90, 93:

> 'There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. The terms "ordinary care", "reasonable prudence," and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case, may under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court.'

"Whether a question is one for the decision of the court or of the jury is a question of federal practice as to which we are governed by federal and not by state decisions. We are bound by state decisions as to the substantive law applicable in a case of this sort, but by federal law, not state law, as to whether a question is for the decision of the judge or the jury under the Seventh Amendment." [See the comment on this question in *Dick* v. *New York Life Insurance Co.*, 359 vs. 437, 79 S. Ct. 921, 926, 3 L. Ed. 2d 935. However, as in the *Dick* case, the tests of sufficiency here are substantially the same.]

The history of this case is uncontradicted proof that "all reasonable men" have not drawn the same conclusions from the facts. The first jury could not agree; the first trial judge ruled that the matter clearly was one for jury determination on all issues; the second jury agreed on a verdict for plaintiff but the second trial judge disagreed with the jury after the verdict and even changed his mind on his trial ruling that there was no evidence of recklessness on the part of plaintiff.

Clearly the questions of contributory negligence and recklessness were jury questions. "By returning a verdict in his favor, the jury necessarily found that Karmarec [Collins, interpolated] had not in fact been guilty of contributory negligence 'even in the slightest degree.'" *Karmarec* v. *Compagnie Generale Transatlantique*, 358 U. S. 625, 79 S. Ct. 406, 409, 3 L. Ed. 2d. 550.

II. *The jury found respondent guilty of causative violation of Sections* 46-361, 46-363, 46-381, *and* 46-393 *of the South Carolina Code of Laws which constitutes evidence of recklessness and gross negligence as a matter of law and the further finding of general negligence on the part of respondent in failing to keep his motor vehicle under proper control, in failing to keep a proper lookout and in falling asleep while driving was ample evidence from which the jury could have found respondent guilty of gross negligence and recklessness.*

It is to be remembered throughout that it is the law of this case that respondent (through his driver Earwood) was guilty of causative negligence proximately contributing to the petitioner's injury. Such negligence was by reason of Earwood's violation of the pertinent Sections of the South Carolina Code: Section 46-361 (excessive speed); Section 46-363 (special hazard existing); Section 46-381 (overtaking and passing); and Section 46-393 (following too closely), as well as his general delicts in failing to keep his vehicle under proper control, failing to keep a proper lookout and in falling asleep while driving.

> "Causative violation of an applicable statute constitutes actionable negligence and is evidence of recklessness, wilfulness and wantonness." *Field vs. Gregory*, 280 S. C. 39, 94 S. E. 2d 15, 19; *Morrow vs. Evans*, 223 S. C. 288, 75 S. E. 2d 598; and *Vernon vs. Atlantic Coast Line Railroad Company*, 221 S. C. 376, 70 S. E. 2d 862.

The importance of having the jury pass upon the question of respondent's gross negligence and recklessness is because of the rule in South Carolina that simple contributory negligence will not bar a plaintiff of recovery "if the contributing conduct on the part of the defendant is so grossly negligent as to imply wantonness, wilfulness or recklessness on his part." *Brain vs. Tribble* (C.A. - 4; S. C.) 238 F. 2d 12, 13.

The evidence that respondent's driver Earwood admitted that he "must have" been asleep at the wheel (he was alone in the truck) after approximately seven hours of night-time driving was sufficient in itself to warrant the jury finding gross negligence and recklessness. It was so held by the North Carolina Supreme Court, applying South Carolina law, in *Harper vs. Harper*, 235 N. C. 260, 34 S.E. 2d 185, 188.

Not without significance is the comment by the trial judge that "The Court of Appeal of the Fourth Judicial Circuit has abolished punitive damages, regardless of the

South Carolina law" (appellant's appendix A-65), because he obviously was influenced by the attitude of the Court of Appeals in taking from the jury the question of respondent's gross negligence and recklessness.

It is not contended here that respondent was guilty of gross negligence or recklessness as a matter of law, only that there was *evidence* of gross negligence and recklessness upon which the jury could have made such finding. It was for the jury and not the court to say whether respondent was guilty of gross negligence and recklessness.

According to the driver Earwood he followed petitioner's truck at a distance of only 100 feet knowing that he could not possibly stop his twenty-five ton tractor in less than 125 feet. Earwood *consciously* and knowingly (according to his own testimony) failed to exercise due care. This is an *admission* of recklessness because the test between negligence and recklessness or gross negligence or wilfulness or wantonness (equivalent terms) is inadvertence. Recklessness is the *conscious* failure to exercise due care. *Tinsley vs. Western Union Telegraph Company*, 72 S. C. 350, 51 S.E. 913, 914; *Glenn vs. Southern Railway Company*, 145 S. C. 41, 142 S.E. 801, 803.

III. *Whether the "main traveled part of the highway" at the point of collision included the improved shoulders was a question of fact to be determined by the jury and not a question of law for the court.*

The sole assignment of contributory negligence to the petitioner was his alleged violation of Section 46-481 of the South Carolina Code (relative to stopping on the main traveled part of the highway). The highway was an eighteen foot wide concrete strip which had shoulders improved with asphalt covering a four and one-half foot strip on each side of the concrete. The asphalt strip was for emergency or "passing" and the concrete strip carried the majority of the traffic according to the Highway Department engineer (appellant's appendix A-64). It is quite significant that the first motorist to arrive upon the collision scene made a marked distinction between the

"paved shoulder" and "*the main lane, the concrete part* of the highway" (emphasis added; appellant's appendix A-52). The jurors were familiar with the road and the type of road concerned a matter of common experience which they were as much entitled to evaluate as the trial judge and because it was a factual issue it was exclusively within their province to say whether the asphalt improved shoulders comprised the main traveled part of the highway the same as the concrete or "main" part. Undisputedly, the concrete part is of a "high type" or better construction than the asphalt improved shoulder (appellant's appendix, A-63).

No South Carolina case has been found that bears on the present discussion but Texas and California decisions hold that in parking on the improved shoulder there is no violation of the statute or else that the question is to be determined by a jury under the facts of each particular case. *Jackson vs. Edmondson* (Texas Civ. App.) 129 S. W. 2d 369; *Ligon vs. Hommell*, (Tex. Civ. App.) 189 S. W. 2d 23; *Ketchum vs. Pattee*, 37 Cal. App. 2d 122, 98 P. 2d 1051; and *Hitchcock vs. Tosta*, 153 Cal. App. 2d 432, 314 P. 2d 513.

Again the court invaded the exclusive province of the jury in holding as a matter of law that the main traveled part of the highway included the asphalt improved shoulder.

## CONCLUSION

The decision of the District Judge, affirmed by the Court of Appeals is certainly a departure from the accepted and usual "federal policy favoring jury decisions of disputed fact questions" and the "federal practice of jury determination of disputed factual issues"; *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356; U. S. 525, 538, 540, 78 S. Ct. 893, 901, 902, 2L. Ed. 2d 953. The *Byrd* opinion repeats a long established principle (356 U. S. at page 537):

> "The federal system is an independent system for administering justice to litigants who properly invoke

its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence — if not the command — of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury". See also, *Maycnau v. Aetna Freight Lines, Inc.*, 360, U. S. 273, 79 S. Ct. 1184, 1188, 3 L.Ed. 2d 1224.

In *Jacob* v. *City of New York*, 315 U. S. 752, 62 S. Ct. 854, 86 L. Ed. 1166, this court said:

> "The right of jury trial in civil cases at common law is a basic and fundamental feature of our sytem of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts."

"The right of trial by jury is of ancient origin, characterized by Blackstone as 'the glory of the English law' and, as Justice Story said *** 'the Constitution would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms.' With, perhaps, some exceptions, trial by jury has always been, and still is, generally regarded as the normal and preferable mode of disposing of issues of fact in civil cases at law as well as in criminal cases. Maintenance of the jury as a factfinding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. ***

"The controlling distinction between the power of the court and that of the jury is that the former is the power to determine the law and the latter to determine the facts." *Dimick* v. *Schiedt*, 293 U. S. 474, 486, 55 S. Ct. 296, 301, 79 L. Ed. 603. See also, *Beacon Theatres, Inc. v. Westover*, 359 U. S. 500, 79 S. Ct. 948, 952, 3 L. Ed. 2d 988.

A citizen's right to a jury determination of disputed and conflicting factual evidence should not be toyed with by the courts, *not even in a single case.* If a court can, at its choosing, invade the factfinding province of the jury then a citizen no longer has a "right" to a jury trial but must seek the court's favor to obtain a jury trial.

For the foregoing reasons this petition for writ of certiorari should be granted.

All of which is respectfully submitted.

THOMAS E. McCUTCHEN, JR.
THOMAS B. WHALEY,
HOOVER C. BLANTON,
813 Barringer Building
Columbia, South Carolina
SOL BLATT, JR.,
Barnwell, South Carolina
Attorneys for Petitioner.

# APPENDIX

## OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JAMES E. COLLINS, JR.,
APPELLANT

*versus.*

HERNDON E. RISNER, d b a
CAPITAL TRUCKING COMPANY,
APPELLEE.

No. 7864

United States Court of Appeals
Fourth Circuit

Argued June 18, 1959.
Decided August 6, 1959.

BARKSDALE, DISTRICT JUDGE.

This diversity personal injury action has been twice tried in the district court. The jury being unable to agree upon a verdict at the first trial, a mistrial was declared and the judge refused defendant's motion for judgment in accordance with his motion for a directed verdict made during the trial D. C. 23, F. R. D. 14. During the second trial, the judge reserved decision on defendant's motion for a directed verdict, made at the close of the evidence, and submitted the case to the jury, which returned a verdict for the plaintiff in the sum of $15,000. Thereafter the judge granted defendant's motion that the verdict of the jury be set aside and that a judgement *non obstante veredicto* be entered for the defendant in accordance with his motion for a directed verdict. From this judgment for the defendant, plaintiff, now the appellant, has prosecuted this appeal. Inasmuch as the jury found for appellant, the evidence must be considered on this appeal in the light most favorable to him, and any conflicts in the evidence

must be resolved in his favor. *Webb v. Robinson*, 4 Cir., 241 F. 99.

Viewing the evidence in this light, the facts may be briefly stated as follows:

Appellant, James E. Collins, Jr., a truckdriver and route salesman for a bakery near Denmark, S. C., loaded his truck and left the bakery warehouse about 5:30 A.M., January 25, 1957, proceeding eastward through Denmark, on U. S. Highway 78, toward Bamberg, S. C. Two other bakery trucks left the warehouse about the same time. A few hundred yards east of Denmark, the bread trucks overtook appellee's large tractor trailer unit operated by Joseph Earwood, traveling in the same direction, and when it slowed down for a railroad crossing, Collins passed it, and very shortly one of the other bakery trucks, driven by one Jimmy Still, passed both the tractor trailer unit and the bakery truck driven by Collins. Thereafter, the three trucks, namely, the bakery truck driven by Still, the bakery truck driven by Collins, and the tractor trailer unit, in that order, continued eastward toward Bamberg at the rate of from 45 to 50 miles per hour. It was dark and cloudy but the visibility was good. Prior to the collision, all three vehicles had their lights on, and the blinker and turn-signal lights were in working order. After proceeding about three miles, in the same order, Still, who was traveling from 150 to 200 feet ahead of Collins, remembered he had forgotten some merchandise which he should have loaded at the warehouse, so he decided to turn around and go back to the warehouse for the forgotten merchandise. Knowing that the two trucks were close behind, he did not undertake to turn around immediately, but gave a right-turn signal, pulled about six or seven feet off the south side of the paved highway, and stopped, so as to enable the two following trucks to pass, before undertaking to turn around. At that point, the highway consisted of eighteen feet of concrete, and four and a half feet of asphalt paving on each side of the concrete, making a total width of twenty-seven feet of concrete and asphalt, and at least eleven feet of level grass-covered dirt shoulder on each side of the road. When Collins saw Still pull off

to the right and stop, apprehending that Still was in some difficulty, he decided to stop and inquire of Still what the trouble was. So he slowed down, turned on his right-turn signal, pulled off to his right, and stopped immediately alongside Still's truck. When Collins began to slow down, he knew the tractor trailer unit was behind him, as he saw the glare or reflection of its lights in his rear-view mirrors, and knew it was coming down a slight grade. At that time, the tractor trailer unit was from 1,000 to 1,500 feet behind Collins. When Collins brought his truck to a stop, the right two wheels were on the dirt shoulder, most of his truck was off the paved portion of the highway, but both his left wheels were on the asphalt paving, the rear of his truck protruding over about half of the asphalt. At this point there was ample room for Collins to stop on the level grassy shoulder, completely off the paved portion of the highway, either behind or in front of Still. When Earwood, driver of appellee's tractor trailer unit, realized that Collins had stopped his truck ahead of him, he attempted to avoid a collision by swinging his vehicle to the left and stopping, but he did not succeed, and the right front of the tractor trailer unit collided violently with the left rear of the bakery truck, resulting in extensive damage to both vehicles and personal injury to both Collins and Earwood. Seeking to recover damages for his personal injuries, Collins instituted this action. The collision occurred from twelve to fifteen seconds after Collins stopped. He had only time to stop the truck open the door to the right, ask "What is the matter?", and the impact occurred before Still could answer. The Collins truck was knocked into the air, turned around, and came to rest about twenty feet from where it had been standing. The tractor trailer unit left no skid marks prior to the collision, and proceeded approximately one hundred feet past Collins' truck. Collins' truck, loaded, weighed approximately six tons; the loaded tractor trailer unit weighed approximately twenty-five tons.

Appellant contends that there is credible testimony that Earwood, driver of the tractor trailer unit, admitted that he was asleep at the time of, or prior to, the collision.

The only basis for this contention is the following testimony of Still: in answer to the question of what happened when he went up to see Earwood immediately after the collision, he said:

> "Well, the front end was mashed in on him. And when I got up there I asked him if I could do anything for him, and he said 'What happened?', and I told him, I said 'You just hit my buddy', and he said 'Your buddy?', and I said 'Yes, you hit my buddy'. He said 'I didn't know it'. I said 'You must have went to sleep'. And he said 'I must have'. He said 'I don't know.'"

Although around noon of that same day, Still gave a written statement to counsel investigating the case, and was asked to tell about how the accident happened, he did not mention this conversation. Neither did he mention it to a State Highway Patrolman who interviewed him. When he did so testify at the first trial, he admitted that he had never mentioned this conversation to anyone but his wife. Earwood, driver of the tractor trailer unit, not only testified that he was wide awake at and before the collision, that he had only driven approximately seven hours and covered a distance of about 230 miles before the collision, but testified that he was not conscious of having made any such statement. He testified that as a result of the collision he was unconscious, "didn't know anything from the time I hit until I woke up in the hospital", the next day. Admittedly, his steering wheel had been driven into his stomach so tightly that wrecker truck was required to release him, and a disinterested witness testified that, at the time Still was standing beside the trailer truck, Earwood was unconscious.

Holding that the evidence did not justify a finding that either Collins or Earwood was guilty of recklessness or gross negligence, the district judge eliminated all questions of gross negligence from the jury's consideration. The question of gross negligence on the part of both drivers having been eliminated from their consideration, the effect of the jury's verdict for the plaintiff constituted a

finding of ordinary negligence on the part of defendant's driver Earwood, which was the sole proximate cause of the collision. The effect of the judge's setting aside the jury's verdict and rendering judgment n.o.v., constitutes a determination on his part that the plaintiff was guilty of contributory negligence as a matter of law, his negligence having contributed as a proximate cause to the collision.

Since on conflicting evidence, the jury found that defendant's driver, Earwood, was guilty of ordinary negligence, which finding was at least tacitly approved by the district judge, it is our conclusion that this finding was fully justified by the evidence. The jury might well have found that Earwood was negligent in operating the trailer truck at a speed greater than was reasonable and prudent under the circumstances, failing to have his vehicle under proper control, or failing to keep a proper lookout.

Also we find no error in the conclusion of the district judge that plaintiff Collins was guilty of such contributory negligence as a matter of law, as to bar his right of recovery. Sec. 46-481 of the Code of Laws of South Carolina, is applicable, the pertinent part of which being:

> "Upon a highway outside of a business or residence district, no person shall stop, park or leave standing any vehicle, whether attended or unattended, upon a paved or main traveled part of the highway it is practicable to stop, park or so leave such vehicle off such part of such highway, * * *."

Appellant contends that the questions of whether or not Collins' truck was parked "upon a paved or main traveled part of the highway", and whether or not it was "practicable to stop, park or so leave such vehicle off such part of such highway", were questions for the jury, and it is true that, under different circumstances and upon different evidence, the submission of such questions to the jury has been approved. Jackson v. Edmondson, Tex. Civ. App., 129 S. W. 2d 369; Howey v. Jordans, Inc., 223 S. C. 71, 74 S. E. 2d 216.

However, here it clearly appears that the highway, at the point of collision, when first paved, consisted of a con-

crete strip eighteen feet wide. Later, the State Highway Department widened the highway by the addition of four and a half feet of asphalt paving on each side of the concrete. There can be no doubt that the "paved or main traveled part of the highway" included the entire width of twenty-seven feet with its two types of paving. Nor can there be any doubt that, under the circumstances then and there existing, it was entirely "practicable" for Collins to stop his truck completely off the hard surface. It appears from plaintiff's own testimony that there was nothing whatever to prevent his stopping behind or in front of Still's truck completely off the hard surface. Undoubtedly, Collins violated the quoted statute and created the very hazard which the statute was enacted to prevent. It is equally obvious that, when Collins violated the statute by stopping with a considerable portion of his truck on the hard surface, and was almost immediately struck by the oncoming tractor trailer unit which he knew was close behind him, his dereliction was one of the proximate causes of the collision. Under such circumstances, it would seem that the language of the court in Sewell v. Hyder, 229 S. C. 480, 93 S. E. 2d 637, 639 is most applicable when, speaking of a plaintiff's violation of the statute prohibiting passing another vehicle at an intersection, the court said:

> "If the only reasonable inference to be drawn from all of the testimony is that the negligence of the complainant is a direct and proximate cause of the injury and damage, or that the negligence of the complainant contributed as a direct and proximate cause, then it would be the duty of the trial judge to order a nonsuit or direct a verdict against such plaintiff."

As will subsequently appear, we find it unnecessary to consider whether Collins was only guilty of ordinary negligence or whether his conduct constituted gross negligence or recklessness.

As previously stated herein, we have concluded that the jury's finding that Earwood, defendant's driver, was guilty of ordinary negligence was fully justified. But

there remains the question of whether or not the district judge erred in not submitting to the jury the question of whether or not Earwood was guilty of gross negligence or recklessness, because, under South Carolina law, if Collins was only guilty of ordinary negligence, and Earwood was guilty of gross negligence or recklessness, then Collins' ordinary negligence would not preclude a recovery against the defendant, Earwood's principal.

> "In this connection, two rules of law laid down by the South Carolina Courts, which were referred to by the judge in his charge, are relevant. In the first place, it is held that ordinary negligence on the part of a plaintiff contributing to an injury does not bar recovery if the contributing conduct on the part of the defendant is so grossly negligent as to imply wantonness, wilfulness or recklessness on his part. Marks v. I. M. Pearlstine & Sons, 203 S. C. 318, 26 S. E. 2d 835; Spearman v. Couch, 218 S. C. 430, 63 S. E. 2d 161; Dawson v. South Carolina Power Co., 220 S. C. 26, 66 S. E. 2d 322. * * *" Bruin v. Tribble, 4 Cir., 288 F. 2d 12, 13.

We are satisfied that, as a matter of law, the evidence would not support a finding of gross negligence or recklessness on the part of Earwood, and that therefore the district court was correct in withdrawing from the jury any consideration of the question of gross negligence or recklessness on the part of Earwood.

As previously indicated, we are satisfied that the evidence was sufficient to justify the jury in finding that Earwood was negligent in operating his vehicle at a greater speed than was reasonable and prudent under the circumstances, failing to have his vehicle under proper control, or failing to keep a proper lookout. But, notwithstanding appellant's contentions, we find no aggravating circumstances disclosed by the evidence sufficient to raise the ordinary negligence of Earwood to the higher degree of gross negligence, recklessness, or wilful and wanton conduct. There is no evidence that prior to the collision Earwood's speed was excessive for ordinary highway driving.

Appellant contends that the extent of the damage resulting from the collision, and the distance traveled by the two vehicles after the collision, are circumstances from which the jury might properly deduce excessive speed. We cannot agree. When a moving vehicle, weighing twenty-five tons, collides with a stationary vehicle weighing only six tons, even if it be traveling at a very moderate speed, it is inevitable that extensive damage will result, and that there will be considerable forward progress of both vehicles. Although Earwood saw, or by keeping a proper lookout should have seen, Collins' right-turn signal, until the contrary appeared, he had a right to assume that Collins would not violate the statute and stop his truck on the paved portion of the highway.

Appellant contends that the evidence of Earwood's going to sleep is an additional circumstance sufficient to take the case to the jury on the question of gross negligence, and cites and relies on the North Carolina case of Harper v. Harper, 225 N. C. 260, 34 S. E. 2d 185, a case in which the North Carolina Court undertook to apply the law of South Carolina, as the accident occurred in South Carolina. It is true that in the Harper case, the court approved the submission to the jury of the question of defendant's gross negligence. However, bearing in mind the very weak evidence that Earwood went to sleep at all and the complete lack of any evidence of any premonitory indications of drowsiness, the following quotation from the opinion (34 S. E. 2d at pages 188, 189) clearly shows how readily distinguishable the Harper case is from the instant case.

> "It is the duty of a motorist, while operating his automobile, to keep a proper lookout and to keep his car under proper control. There is evidence tending to show that defendant admits that he failed to do so. He attributes his inattention to drowsiness followed by complete unconsciousness. In any event, on this record, he either failed to keep a proper lookout and to give due attention to the manner of operation or, looking where he was going, he intentionally swerved

his car to the left and drove his automobile down a thirty-foot embankment. His conduct can be explained only on one postulate or the other. It is more charitable to assume that his act was not deliberate.

"Even so, he knew he was drowsy. He had fallen asleep once before. Sleep, 'tired nature's sweet restorer', is usually indicated by certain premonitory symptoms, and does not come upon one unheralded. These premonitory symptoms were present on this occasion. If defendant disregarded these warnings and instead, knowing that he was in no condition to exercise that degree of alertness and care in keeping the lookout required of a motorist, continued to operate the automobile, then the inference that his conduct was not mere inadvertence but amounted to a conscious failure to be careful of the safety of others is permissible. The nature and quality of his act, whether an inadvertence or a conscious failure to perform a positive duty, was for the jury to decide."

No other decision declaring the law of South Carolina on the question of whether the driver's going to sleep constitutes ordinary or gross negligence, has been cited to us, nor do we find any. However, there is appended to the case of Antonen v. Swanson, 74 S. D. 1, 48 N. W. 2d 161, 28 A. L. R. 2d 1, an exhaustive note entitled "Physical defect, illness, drowsiness, or falling asleep of motor vehicle operator as affecting liability for injury", the subject of "Operator"s act of falling asleep" beginning at page 44 of 28 A. L. R. 2d.

As factors influencing the determination of whether or not the driver's going to sleep constitutes negligence, there are listed recent lack of sleep, length of time at wheel, presence of premonitory symptoms, driving under the influences of liquor, and strenuous activities before driving.

On the question of whether or not the driver's falling asleep constitutes gross negligence, decisions from numerous states are summarized as follows, (28 A. L. R. 2d at pages 60, 61);

> "The numerous cases in which courts have considered the question of whether falling asleep while operating a car is in itself gross negligence are almost unanimously to the effect that the fact of falling asleep while driving is sufficient to establish a prima facie case of ordinary negligence only, but that it is not sufficient to take the case to the jury on the question of the operator's gross negligence. Stated differentially, if plaintiff in an action based on gross negligence shows merely that the operator of the motor vehicle fell asleep while driving, a directed verdict for the defendant is proper"

We think this general rule is applicable here. There is no evidence that prior to the collision Earwood nodded or felt any drowsiness. He had driven only seven hours and a half during the preceding twenty-four hour period. He did no driving on Thursday until he left Atlanta at 11:00 o'clock P.M., and drove approximately 230 miles to the scene of the accident, which took place shortly before 6:00 o'clock Friday morning, at which time he had been driving slightly less than seven hours, well within the allowable driving time of ten hours. The evidence tending to show that Earwood went to sleep, is so flimsy it is hardly, if at all, sufficient to justify a finding that he went to sleep. Certainly, this evidence, considered in connection with all the other evidence as to Earwood's conduct, only justifies a finding of ordinary negligence on his part.

It therefore follows that the judgment of the district court will be

Affirmed.